Supreme Court, U.S.
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No. 96-36

In The

Supreme Court of the United States

October Term, 1995

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, and BOARD OF HEALTH OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioners,

vs.

ROBERT DALE HARRISON,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

James L. Murphy III
Stephen Nunn
Counsel of Record
John L. Kennedy

Metropolitan Department of Law
Attorneys for Petitioners

204 Metropolitan Courthouse
Nashville, Tennessee 37201
615/862-6341

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

The most striking feature of Respondent's Brief in Opposition to the Metropolitan Government's Petition for Certiorari is that Respondent nowhere disputes the Metropolitan Government's position that the courts below went beyond the parameters of the 1982 Consent Decree. While not dispositive, surely this implicit admission is entitled to some weight in the decision whether to grant certiorari.

A. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent dwells at length on the allegations that Mr. Larry Cole used the epithet "nigger" in referring to the Respondent. (It should be noted that Mr. Cole himself is black.) Respondent also emphasizes allegations that a white employee brought Ku Klux Klan paraphernalia to the workplace. There was evidence that these things occurred; and it is undisputed that on at least one occasion an item of Ku Klux Klan paraphernalia was brought to the workplace. The Metropolitan Government has always stated that any such conduct was reprehensible in the extreme. However, such incidents were at most, even accepting all of Respondent's allegations as true, isolated incidents which did not rise to the standard necessary to show racial harassment. *Davis v. Monsanto Chemical Company*, 858 F.2d 345 (6th Cir. 1988); *Nazaire v. T.W.A.*, 807 F.2d 1372 (7th Cir. 1986); *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985). The Sixth Circuit agreed with this, and reversed the District Court's finding of harassment as being clearly erroneous. *Harrison v. Metropolitan*

Government, 80 F.3d 1107 at 1117-18 (6th Cir. 1996). Respondent has not appealed from this finding and therefore should not be permitted to rely upon these inflammatory factual allegations.

At page 5 of his brief, Respondent complains of an alleged failure to assign supervisory responsibilities to him. This is another example of the Respondent's desire to go beyond the scope of the Consent Decree, which nowhere requires the Metropolitan Government Government to assign him supervisory responsibilities. Nowhere in the record is there any proof that supervisory duties are a necessary component of accrual of seniority of promotional opportunity. The District Court in effect created a right to be assigned supervisory duties out of thin air without benefit of proof. A district court cannot simply add provisions to a consent decree to satisfy the purposes of one of the parties. *Firefighters v. Stotts*, 467 U.S. 561 at 574 (1984).

The Respondent's brief implies, at page 6, that he was always paid less than all of the Senior Rabies Control Officers; but this is not the case. For several years he was paid the same as Mr. Hendrixson, who is white, but in the last two months of his tenure received less due to a prior poor performance evaluation.

At page 8 of his brief – repeating an error made before the Sixth Circuit – Respondent claims that Mr. Ed Watkins was white. Mr. Watkins is black, a fact established at Vol. II, page 205 of the transcript of the record.

The Metropolitan Government notes that most of the allegedly "pretextual" reasons for discharging Harrison complained of at pages 8-11 of the brief were not, in fact,

relied upon by the Metropolitan Government for purposes of this Petition and are therefore not relevant here.

B. REPLY TO RESPONDENT'S REASONS WHY THE PETITION SHOULD BE DENIED.

Respondent apparently contends that this Petitioner has waived the right to raise the question of due process of law in this Petition for Certiorari, contending that that issue was not addressed by the District Court or the Court of Appeals.

With respect to the District Court, the issue of whether the Court had gone beyond the scope of the Consent Decree could not by definition arise until after the Court ruled. It could not previously have been presented to the District Court in those terms. With respect to the Court of Appeals, the issue was in fact raised. Review of the Petitioner's principal brief discloses that the Metropolitan Government did, at pages 15-16, raise the issue of the District Court going beyond the scope of the 1982 decree. Moreover, the Metropolitan Government's Reply Brief, at page 7, specifically alleges that the Metropolitan Government was "deprived of any notice and opportunity to present proof" because of the way the District Court misconstrued the Consent Decree with respect to the issue of promotion. While the exact words "due process" may not be articulated in the briefs, the substantive issue – the Court's effectively rewriting the Consent Decree – was both briefed and argued.

As noted in the Petition for Certiorari, moreover, an important federal question is at issue in this Petition, even if the Metropolitan Government, being a political

subdivision of a state, is deemed unable to assert due process; or if Respondent's position that the issue is waived is accepted for purposes of argument. As stated in the Metropolitan Government's Petition, at page 12, contract rights and the federal common law applicable to consent decrees created by the decisions of this Court are at issue independent of the concept of due process per se. Consent decrees are said to be especially important and valuable for resolution of Title VII litigation. *International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 at 517-24 (1986). This Government will be disinclined to resolve Title VII lawsuits (and perhaps other federal litigation) by entry of a consent decree if the rulings of the courts below in this case stand. Whether other litigants will be similarly disinclined to rely upon consent decrees is of course a matter of speculation. But to the extent that viability of consent decrees, especially in the context of Title VII, is considered an important federal question, this case certainly seems to meet that criterion.

Finally, Petitioner would again note that Respondent nowhere in his brief denies or disputes that the District Court, and the Court of Appeals to the extent that it affirmed the District Court, traveled beyond the bounds of the 1982 Consent Decree. While not entirely dispositive, surely this implicit acknowledgment that the terms of the Consent Decree were not respected should be

given some weight in the decision whether to grant the Petition for Certiorari.

Respectfully submitted,

STEPHEN NUNN
Counsel of Record
JAMES L. MURPHY III
JOHN L. KENNEDY
Metropolitan Department of Law
Attorneys for Petitioners
204 Metropolitan Courthouse
Nashville, Tennessee 37201
615/582-6341